APPENDIX 1a

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 17-14761
Non-Argument Calendar

D.C. Docket No. 1:16-cv-00080-AT

W.A. GRIFFIN, MD,

Plaintiff-Appellant,

versus

VERIZON COMMUNICATIONS INC., ANTHEM INSURANCE COMPANIES, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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(August 20, 2018)
Before MARCUS, MARTIN, and ROSENBAUM, Circuit Judges. PER CURIAM:

Dr. W. A. Griffin, proceeding pro se, appeals the dismissal of her claim of discrimination in the administration of health care benefits. After careful consideration, we affirm.

Griffin is a dermatologist, and in 2013 she treated two employees of Verizon Communications, Inc. The employees assigned their rights under Verizon's healthcare plan to Griffin. Griffin pursued ERISA claims on the patients' behalf and then sued Verizon in federal court for benefits under the health plan. Verizon moved to dismiss because the health plan had an anti-assignment provision, meaning the assignment to Griffin was invalid. The district court dismissed the case on that ground, and a panel of this Court affirmed. See Griffin v. Verizon Commc'ns, Inc., 641 F. App'x 869, 871, 872–74 (11th Cir. 2016) (per curiam) (unpublished).In 2016, Griffin brought this lawsuit against Verizon, alleging that Verizon selectively enforces the anti-assignment provision in its health plan against female and minority healthcare providers. Her claim of discrimination was based on Griffin's search of docket filings in five federal cases.1 Griffin alleged that each of

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[1] The cases were: (1) Cohen v. Anthem Insurance Co., No. 3:15-cv-03675-FLW-DEA (D.N.J.); (2) The Loft Chiropractic, P.C. v. Empire Healthchoice Assurance, Inc., No. 1:12-cv- 07272-PKC (S.D.N.Y.); (3) Patient Care Associates LLC v. Verizon Communications, Inc., No. 2:12-cv-03750-CCC-JAD (D.N.J.); (4) Community Chiropractic of Country Club, PLLC v. Empire Healthchoice Assurance, Inc., No. 1:12-cv-05485-PKC (S.D.N.Y.); and (5) Neurological Surgery, P.C. v. Verizon Communications, Inc., No. 2:15-cv-04074-ADS-GRB (E.D.N.Y.).

these cases was brought by a Caucasian male healthcare provider suing Verizon for health benefits, and that despite the presence of an anti-assignment provision in all of Verizon's health plans, Verizon did not enforce the anti-assignment provision against these providers. This contrasted with how Verizon treated her, an African- American female healthcare provider. Griffin brought her claim under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, which prohibits health plan providers who receive federal funds from discriminating based on sex or race.Verizon moved to dismiss Griffin's complaint, noting that no court in this circuit has determined whether Section 1557 affords a private right of action.Verizon went on to argue that even if it did, its health plan does not receive the requisite federal funding for Section 1557 to apply. Griffin then amended her complaint. Verizon again moved to dismiss on the grounds that its health plan was not subject to Section 1557. Griffin responded that Verizon's health plan did receive federal funds, and she moved for leave to file a second amended complaint so she could add "additional exhibits that clarify precisely how 'parts' of the Verizon plan received federal financial assistance."

The district court allowed Griffin to file her second amended complaint.Griffin later filed a corrected version of the second amended complaint that added

Anthem Insurance Companies, Inc. as a defendant. Anthem is Verizon's claim agent for claims arising out of the health plan.

Verizon and Anthem moved to dismiss Griffin's second amended complaint.

Verizon again argued that its health plan was not subject to Section 1557, but it also argued that the examples relied on by Griffin showed no discrimination. According to Verizon, because it raised "the issue of the anti-assignment provision or asserted a lack of standing as a defense" in the cases Griffin pointed to as evidence of its favor to Caucasian male providers, she failed to allege facts showing discrimination. Verizon attached docket reports and the underlying filings from those cases showing either that Verizon did assert a defense of anti- assignment, or that it asserted the plaintiff lacked standing.[2]

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[2] A defense based on standing gives credence to Verizon's argument because an anti- assignment provision would deprive the plaintiff of the statutory standing needed to claim benefits under a health plan. See Physicians Multispecialty Grp. v. Health Care Plan of Horton Homes, Inc., 371 F.3d 1291, 1294 (11th Cir. 2004) (noting that "[h]ealthcare providers . . . [generally] lack independent standing to sue under ERISA," but "may acquire derivative standing . . . by obtaining a written assignment from a 'beneficiary' or 'participant' of his right to payment of benefits under an ERISA-governed plan").

In response, Griffin pointed to language from Verizon's response to a motion to remand in one of the cases, where Verizon argued the alleged assignment was sufficient for the case to remain in federal court. She offered no arguments concerning the other four cases. However, she did add a sixth case purporting to demonstrate discrimination: Shuriz Hishmeh, M.D., PLLC v.Verizon Communications, Inc., No. 2:16-cv-06347-JMA-SIL (E.D.N.Y.). Griffin noted only that Hishmeh involved "another male [] provider," but did not elaborateon how Hishmeh fit the pattern of alleged discrimination.

The district court granted the motions to dismiss. It explained that although no appellate court has yet explained the standard or burden of proof for a claim under Section 1557, any claim under that statute would necessarily involve an allegation of discrimination. The district court then took judicial notice of the public records submitted by Verizon and found that Verizon did assert defenses based on lack of standing or anti-assignment, which contradicted Griffin's claims of discrimination. The court therefore granted the motions to dismiss for failure to state a claim. Griffin appealed.

"We review de novo the district court's grant of a motion to dismiss under
[Federal Rule of Civil Procedure] 12(b)(6) for failure to state a claim, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003) (per curiam).In order to survive a Rule 12(b)(6) motion to dismiss, a complaint "does not need detailed factual allegations" to show entitlement to relief, but must provide "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964–65 (2007). A complaint must contain "enough facts to state a claim to relief that is plausible on its face." Id. at 570, 127 S. Ct. at 1974. "A claim has facialplausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). "Pro sepleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148F.3d 1262, 1263 (11th Cir. 1998) (per curiam).

III.

Griffin argues the district court erred by finding she failed to allege discrimination, and by failing to rule that Verizon's plan was subject to Section 1557.

As the district court noted, neither this Court, nor any other circuit court, has yet ruled on the standard necessary for bringing a claim under Section 1557.

Section 1557 prohibits discrimination or the denial of benefits from "any health program or activity, any part of which is receiving Federal financial assistance," on the basis of race, color, national origin, sex, age, or disability.[3] 18 U.S.C. § 18116(a). We agree with the district court that regardless of the ultimate standard adopted, a claim under Section 1557 must include, at a minimum, an element of discrimination.

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[3] The statute does not expressly name these grounds of prohibited discrimination, but instead incorporates by reference the following anti-discrimination laws: (1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; (2) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681; (3) the Age Discrimination Act of 1975, 42 U.S.C. § 6101; and (4) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Griffin alleged only one form of discrimination: that Verizon did not assert an anti-assignment defense when sued by Caucasian, male healthcare providers. If these allegations are unfounded, then she has not plausibly alleged discrimination.[4] The district court analyzed this issue by looking to the documents Verizon attached to its motion to dismiss.

Ordinarily, at the motion to dismiss stage, "the court limits its consideration to the pleadings and exhibits attached thereto." GSW, Inc. v. Long Cty., 999 F.2d1508, 1510 (11th Cir. 1993). However, "a district court may consider an extrinsic document even on Rule 12(b)(6) review if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged." U.S. ex rel. Osheroff v. Humana Inc.,776 F.3d 805, 811 (11th Cir. 2015). Similarly, "a district court may consider judicially noticed documents." Id.; see also Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding."). Judicial notice of "an adjudicative fact" is appropriate when it "is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose

[4] We assume for the purposes of this opinion, but do not decide, that an allegation of discriminatory enforcement of the anti-assignment provision during litigation qualifies as an allegation of discrimination under Section 1557.

accuracy cannot reasonably be questioned." Fed. R. Evid. 201(a), (b)(2). Courts typically take judicial notice of record documents from other judicial proceedings. See, e.g., Lozman v. City of Riviera Beach, 713 F.3d 1066, 1075 n.9 (11th Cir.2013); Cash Inn of Dade, Inc. v. Metropolitan Dade Cty., 938 F.2d 1239, 1243 (11th Cir. 1991).

The documents submitted by Verizon are from the public dockets of federal judicial proceedings. That being the case, they are not subject to reasonable dispute, and the district court did not err by taking judicial notice of them. We will do the same. The documents submitted by Verizon do not support Griffin's claim of discrimination in the enforcement of the anti-assignment provision. Beginning with Cohen[5]—the only cited case in which Verizon and Anthem were both parties—Griffin points to the fact that Verizon opposed a motion to remand the case to state court by arguing that an employee's "alleged assignment" of benefits meant that the case could originally have been brought in federal court. However, Verizon's response to remand does not concede that the assignment was valid.The case remained in federal court, and Verizon and Anthem asserted in a joint motion for summary judgment that the claims were barred by the anti-assignment

[5] Cohen v. Anthem Ins. Co, No. 3:15-cv-03675-FLW-DEA (D.N.J.).

provision. Similarly, in Neurological Surgery,[6] Verizon's answer expressly
asserted the plaintiff lacked standing because the plans had anti-assignment provisions.[7]
In Patient Care,[8] Verizon argued in its notice of removal that the complaint
"alleges that the Plaintiff is the assignee" of a health plan beneficiary, and that was sufficient for the claim to be governed by ERISA. However, Verizon never acceded to the validity of the assignment. Verizon asserted in its answer that the plaintiff lacked standing and that the claims were barred by the terms of the health benefits plan. This case was then voluntarily dismissed before any motions were
filed.In Loft Chiropractic[9] and Community Chiropractic,[10]

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[6] Neurological Surgery, P.C. v. Verizon Commc'ns, Inc., No. 2:15-cv-04074-ADS-GRB (E.D.N.Y.).

[7] While Griffin's case was before the district court, Neurological Surgery remained pending in the trial court in New York.

[8] Patient Care Assocs. LLC v. Verizon Commc'ns, Inc., No. 2:12-cv-03750-CCC-JAD (D.N.J.).

[9] The Loft Chiropractic, P.C. v. Empire Healthchoice Assurance, Inc., No. 1:12-cv- 07272-PKC (S.D.N.Y.).

[10] Cmty. Chiropractic of Country Club, PLLC v. Empire Healthchoice Assurance, Inc., No. 1:12-cv-05485-PKC (S.D.N.Y.).

Verizon asserted in its answer that the plaintiffs lacked standing. While Verizon did not specify the basis for asserting the lack of standing, an assertion of a lack of standing is consistent with enforcement of the anti-assignment provision. See Physicians Multispecialty, 371 F.3d at 1293–95 (holding that anti-assignment provision deprived healthcare provider of statutory standing for ERISA claim). We do not know whether Verizon would have followed through and argued based on the anti-assignment provision because both cases were voluntarily dismissed before any motions were filed. Nevertheless, our review of these cases does not show that Verizon acted inconsistently with enforcing the anti-assignment provision. Thus, these two cases also fail to demonstrate a discriminatory litigation strategy.

Finally, Griffin cited only to the complaint in the newly filed Hishmeh.[11]

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[11] Shuriz Hishmeh, M.D., PLLC v. Verizon Commc'ns, Inc., No. 2:16-cv-06347-JMA- SIL (E.D.N.Y.).

At the time Griffin raised Hishmeh for comparison, Verizon had not yet filed a responsive pleading. Thus there was no credible allegation that it failed to enforce the anti-assignment provision.In sum, half of the cases cited by Griffin show that Verizon did in fact assert a defense based on the anti-assignment provision, and in the others Verizon made arguments consistent with that defense at the early stages of the case. Griffin responds by pointing to the filings in Cohen and Patient Care that addressed whether the case belonged in federal court. However, those filings do not negate the fact that Verizon asserted defenses based on lack of standing and the anti-assignment provision. Griffin offers no argument for the other cases beyond conclusory statements that it "was a smooth, easy cruise through federal court" for those plaintiffs. But we need not credit allegations that are "vague and conclusory." Fullman v. Graddick, 739 F.2d 553, 557 (11th Cir. 1984).

Griffin amended her complaint twice, but alleged only one form of discrimination. Based on the record before the district court, Griffin failed to plausibly allege that form of discrimination, and therefore the court correctly dismissed her claims against Verizon and Anthem.[12]

AFFIRMED.

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[12] Because Griffin failed to plausibly allege discrimination, we need not reach her argument that the district court erred by declining to find that Verizon's health plan was subject to Section 1557.

APPENDIX B

1B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

W. A. Griffin,
M.D. Pro Se
Plaintiff,

v.

Verizon
Communication
and Anthem
Insurance
Companies, Inc.
Defendants.

Civil Action No.
1:16-CV-00080-
AT

ORDER

This matter is before the Court on Defendant Verizon Communications, Inc. ("Verizon") and Defendant Anthem Insurance Companies, Inc.'s ("Anthem") joint Motions to Dismiss [Docs. 38 & 39]. Plaintiff W.A. Griffin, M.D. alleges that Defendants discriminated against her on the basis of race and gender under Section 1557 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C.
§ 18116. Defendants argue that Plaintiff failed to state a claim and therefore Plaintiff's Second Amended Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

For the reasons stated below, the Court **GRANTS** Defendants' Motions to Dismiss [Docs. 38 & 39].

FACTUAL BACKGROUND

As a condition of providing dermatological services, Plaintiff requires patients to assign her their rights to sue for unpaid medical benefits under each patient's respective insurance plan. (Second Am. Compl. ¶ 2.) Plaintiff provided dermatological services as an out-of-network provider to two Verizon employees who were members of Verizon's employee group health plan ("Verizon Plan" or "Plan"). (Id. ¶ 9.) Arguing that she was not paid "at the benefit level that was promised" pursuant to the Plan for the dermatological services rendered to the two Verizon employees, Plaintiff filed four ERISA appeals and one external review request through Anthem, Verizon's claims agent. (Id. ¶¶ 8–10.) After receiving unfavorable determinations from Anthem, Plaintiff filed suit against Verizon under ERISA, again arguing that Verizon failed to pay Plaintiff the correct amount for dermatological services rendered under the Plan. (Id. ¶¶ 11– 15.) Verizon moved to dismiss Plaintiff's claim for underpaid medical bills, arguing that the ERISA-governed Plan documents barred its employees from assigning their rights to sue for unpaid medical benefits. (Id. ¶¶ 11–15, 20.) The Court subsequently dismissed Plaintiff's ERISA claim because Plaintiff's claim was barred by the anti-assignment provision in the Plan. (Id.)

After Plaintiff's previous case against Verizon was dismissed, Plaintiff brought this suit against Verizon. Plaintiff now asserts that Verizon secretly discriminates in its Plan documents to deprive female and minority medical providers standing to sue under ERISA by selectively enforcing the Plan's anti-assignment provisions in litigation. (*Id.* ¶ 18.) While Plaintiff admits that the Plan language is "uniform across state borders" and identical across "all . . . Verizon plans," Plaintiff asserts that the Plan "is set up to selectively . . . enforce [anti-assignment] provisions based upon the demographics of the medical provider." (*Id.*; Pl.'s Resp. at 4.) Plaintiff believes that the Plan contains "schemes" that allow for Defendants to provide ERISA standing to some medical providers while denying the same ERISA standing to other providers, particularly those who are females and members of a minority ethnic group. (Second Am. Compl. ¶ 19.) According to Plaintiff, Defendants have established an order of preference for conferring ERISA standing using the anti-assignment clause in the Plan. (*Id.* ¶ 21.)

"[L]ikely candidates" to receive ERISA standing are members of the "Good Old Boys Club," or individuals of male Caucasian-American decent, who "have the financial means to hire Fortune 500 lawyers." (*Id.*) In sum, Plaintiff, who is a female, African-American medical provider, alleges that Defendants did not grant her ERISA standing because "she is of a different gender and race" than her white, male counterparts. (*Id.* ¶ 24.)

Plaintiff relies on six other federal cases,[1] in which Verizon or Anthem was sued by medical providers for unpaid benefits under ERISA, as support for her

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[1] Plaintiff's Second Amended Complaint contained allegations regarding five cases. She referred to a sixth case, *Shuriz Hishmeh, M.D., PLLC v. Verizon Communications, Inc. et al.*, No. 2:16- cv-06347 (E.D.N.Y. Feb. 24, 2017), in her Response to Defendants' Motions to Dismiss. (Pl.'s Resp. at 2.) Although courts may consider only allegations raised in the complaint on a motion to dismiss, the Eleventh Circuit has held that when a *pro se* plaintiff raises additional allegations in their filings, the allegations should be liberally construed as a motion to amend the complaint and considered by the court. *Newsome v. Chatham Cty. Det. Ctr.*, 256 F. App'x 342, 344 (11th Cir. 2007) (per curiam). Hence, the Court will consider Plaintiff's sixth case when ruling on Defendants' Motions to Dismiss

discrimination claim. (*Id.* ¶¶ 22–35.) Plaintiff alleges that, in each of these other cases, Verizon did not seek to enforce the anti-assignment provision against white, male providers when the provider brought a lawsuit against Defendants for unpaid medical benefits. (*Id.* ¶¶ 22–64.) Thus, according to Plaintiff, Defendants discriminated against her "by denying her derivative standing under ERISA because of [Plaintiff's] gender and race." (*Id.* ¶ 65.)

Plaintiff filed her initial complaint alleging race and gender discrimination under Section 1557 of the ACA on January 11, 2016, with Verizon as the only named defendant. After Verizon moved to dismiss Plaintiff's complaint on February 2, 2016, Plaintiff amended her complaint as a matter of right on February 3, 2016. The Court therefore denied Verizon's first motion to dismiss as moot. Verizon then moved to dismiss Plaintiff's amended complaint, arguing that it did not receive Federal financial assistance in connection with administering the Plan, which is necessary in order

to fall under Section 1557's discrimination mandate. Subsequently, Plaintiff moved for leave to file a second amended complaint to name Anthem as a defendant and add additional allegations regarding Verizon's contract and relationship with Anthem. The Court granted Plaintiff's motion to file a second amended complaint but limited Plaintiff solely to adding Anthem as a named defendant. *See Griffinv. Verizon Commc'ns,* No. 1:16-cv-00080-AT, Doc. 25 (N.D. Ga. Sept. 23, 2016).

In addition, the Court denied Verizon's second motion to dismiss without prejudice because of Verizon's inadequate briefing of a novel legal question on an issue of first impression.[2]

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[2]The Court advised that any subsequent motion to dismiss must address in more detail: (1)
whether Defendants are recipients of Federal financial assistance within the meaning of Section 1557; (2) if Section 1557 provides a private right of action; and (3) if so, the scope and extent of that private right of action under Section 1557. Id. The Court also directed the parties to discuss these issues in light of the final regulations promulgated by the Office of Civil Rights of the Department of Health and Human Services, which were published on May 18, 2016 and took effect on July 18, 2016. Id.

Defendants now seek to dismiss Plaintiff's Second Amended Complaint under Rule 12(b)(6) on the basis that Plaintiff has not alleged facts sufficient to show that Defendants treated her differently than her white, male counterparts as required to state a claim for relief under Section 1557. Specifically, Defendants contend that because they asserted either an anti-assignment or a lack of standing argument as to the medical providers in each of the cases on which Plaintiff relies, her allegations of discrimination are not plausible. (Defs.' Mot. Dismiss at 5–11.) Alternatively, Verizon also renews its argument that Plaintiff has failed to state a claim under Section 1557 because Verizon does not receive Federal financial assistance as required by Section 1557 by virtue of using Anthem as its claims agent. (*Id.* at 16–19.) In addition, Verizon argues that it does not meet the standard for employer liability under Section 1557, and thus Plaintiff's claim against Verizon should be dismissed under Rule 12(b)(6). (*Id.* at 20–24.)

STANDARD FOR MOTION TO DISMISS

This Court may dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A pleading fails to state a ~~claim if it~~ does not contain allegations that support recovery under any recognizable legal theory. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1216 (3d ed. 2002); see also Ashcroft v. Iqbal, 556 U.S. 662, 677–78 (2009). In considering a Rule 12(b)(6) motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. See Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993). A plaintiff need not provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In essence, the pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

ANALYSIS

Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability "under any health program or activity . . . receiving Federal financial assistance." 42 U.S.C. § 18116(a); see also Bernier v. Trump, 242 F. Supp. 3d 31, 43-44 (D.D.C. 2017); Callum v. CVS Health Corp., 137 F. Supp. 3d 817, 847 (D.S.C. 2015); Rumble v. Fairview Health Servs., No. 14-2037, 2015 WL 1197415, at *10 (D. Minn. Mar. 16, 2015). Section 1557 expressly incorporates the following four federal civil rights statutes to provide the classes of those protected by the statute's non-discrimination provision and the remedies and procedures available thereunder: (1) Title VI, 42 U.S.C. § 2000d, which prohibits discrimination on the basis of race, color, and national origin; (2) Title IX, 20 U.S.C. § 1681, which prohibits discrimination on the basis of sex; (3) the Age Discrimination Act, 42 U.S.C. § 6102, which prohibits discrimination on the basis of age; and (4) Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, which prohibits discrimination on the basis of disability. Thus, Section 1557 provides that no individual shall, on these grounds:

be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

42 U.S.C. § 18116(a).[3]

No circuit court has determined what standard or burden of proof should apply to a Section 1557 claim. Other district courts have grappled with the question. *Compare Rumble*, 2015 WL 1194415, at *10 (holding that Congress "intended [for] the same standard and burden of proof to apply to a Section 1557

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[3] Defendants do not dispute for the purposes of their Motions to Dismiss that Section 1557 affords a private right of action. In any event, other district courts have held that, through Section 1557's incorporation of four other federal statutes, Section 1557 affords a private right of action. *Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015); *Callum*, 137 F. Supp. 3d at 848; *Rumble v. Fairview Health Servs.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1194415, at *7 n.3 (D. Minn. Mar. 16, 2015); *cf. Ass'n of N.J. v. Horizon Healthcare Servs., Inc.*, No. 16-08400(FLW), 2017 WL 2560350, at *5 (D.N.J. June 13, 2017). In addition, the final regulations regarding Section 1557 state that the statute confers a private right of action. 45 C.F.R. § 92.302(d) ("An individual or entity may bring a civil action to challenge a violation of Section 1557 or this part in a United States District Court . . . .").

plaintiff, regardless of the plaintiff's protected class status"), *with Se. Pa. Transp. Auth. v. Gilead Scis., Inc.*, 102 F. Supp. 3d 688, 696 (E.D. Pa. 2015) (holding that the standard and burden of proof for a discrimination claim under Section 1557 changes depending upon the type of discrimination alleged and should be drawn from the relevant statute listed in 42 U.S.C. § 18116(a)). However, courts recognize that, regardless of the standard, Section 1557 requires a plaintiff to prove discrimination as an element of his or her claim. *See, e.g.*, *Callum*, 137 F. Supp. 3d 817, 853 n.25 (D.S.C. 2015) (declining to determine "the precise standard(s) and burden(s) to apply to the types of discrimination alleged" for a Section 1557 claim on a Rule 12(b)(6) motion to dismiss when plaintiff alleged a plausible claim of discrimination based on his race, gender, and disability); *Rumble,* 2015 WL 1194415, at *18 (declining to rule on the exact standard required for a Section 1557 gender discrimination claim but allowing plaintiff's claim to proceed on a Rule 12(b)(6) motion to dismiss

when plaintiff alleged a plausible claim of discrimination); *Cruz v. Zucker*, 116 F. Supp. 3d 334, 348–49 (S.D.N.Y. 2015) (dismissing plaintiff's claim under Rule 12(b)(6) because plaintiff failed to allege discrimination but declining to discuss the applicable standard for a gender discrimination claim under Section 1557); *Bernier v. Trump*, 242 F. Supp. 3d at 43-44 (dismissing plaintiff's discrimination claim under Rule 12(b)(6) because plaintiff's claim was "a bald assertion unsupported by any facts" but declining to address the requisite standard or elements of a discrimination claim). Therefore, at this stage of the proceeding, the Court need not determine the requisite standard or elements for a race or gender discrimination claim under Section 1557. It is sufficient to find that in order to state a Section 1557 claim, Plaintiff must plausibly allege that Defendants excluded her from participation in, denied her the benefits of, or subjected her to discrimination on the basis of her race and/or sex.

Plaintiff's Section 1557 discrimination claim is based entirely on her discussion of six comparator cases in which Plaintiff alleges that Defendants did not seek to enforce anti-assignment provisions against white, male providers bringing benefit claims on behalf of patients. (Second Am. Compl. ¶ 18.) Defendants argue that in all six cases, they

did, in fact, either assert an anti- assignment argument or a lack of standing argument, rendering Plaintiff's claim facially implausible. (Defs.' Mot. Dismiss. 5–11.) In response, Plaintiff argues that she has provided sufficient "factual support and case law references to show a reasonable inference that she has been treated differently." (Pl.'s Resp. at 5.) Upon review of each of the six cases cited by Plaintiff, the Court finds that Defendants either did, in fact, raise defenses based on lack of standing and/or an anti-assignment provision in the plan documents, or the case was voluntarily dismissed. The Court examines each of the six cases in turn.[4]

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[4] A district court may take judicial notice of public records without converting a motion to dismiss into a motion for summary judgment when the public records are "capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned," and thus "not subject to reasonable dispute." Universal Express, Inc. v. U.S. S.E.C., 117 F. App'x 52, 53 (11th Cir. 2006); Horne v. Potter, 392 F. App'x 800, 802 (11th Cir. 2010) (per curiam); Fed. R. Evid. 201(b). Such public documents include the record in other judicial cases. Cash Inn of Dade, Inc. v. Metropolitan Dade Cnty., 938 F.2d 1239, 1243 (11th Cir. 1991). In addition, "in ruling upon a motion to dismiss, the district court may consider . . .

Plaintiff first cites Jason D. Cohen, M.D. F.A.C.S. et al. v. Anthem Insurance Companies, Inc. et al., No. 3:15-cv-03675-FLW-DEA (D.N.J. June 1, 2015), as a foundation for her discrimination claim. (Second Am. Compl. ¶¶ 25– 27.) In Cohen, the plaintiffs, an orthopedic surgeon and a professional orthopedic medical organization, brought suit against Verizon and Anthem "as assignee and designated authorized representative of Patient NM" for underpaid medical benefits pursuant to Verizon's employee group health plan for their treatment of a Verizon employee who had assigned the plaintiffs her rights. Cohen, No. 3:15-cv-03675-FLW-DEA, Compl., Doc. 1 Ex. A. Verizon and Anthem collectively removed the case to federal court on the basis that the plaintiffs' lawsuit sought to recover benefits under the terms of a plan governed by ERISA and that "as an assignee of Patient N.M.'s rights and benefits,

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extrinsic document[s] if [they are] (1) central to the plaintiff's claim, and (2) [their] authenticity is not challenged." Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010). Plaintiff's six comparator cases are central to Plaintiff's claim because her Section 1557 claim is based solely on the litigation history of these cases. Further, neither party challenges the accuracy or authenticity of Plaintiff's six comparator cases. The Court therefore finds it can properly consider the litigation history of Plaintiff's six comparator cases in ruling on Defendants' Motions to Dismiss.

Plaintiffs have standing to sue under ERISA . . . and could have asserted their claim to recover benefits . . . under ERISA § 502." Id., Not. of Removal, Doc. 1 ¶¶ 11-16; see also Resp. Opp. Mot. to Remand at 8-9 (arguing under Third Circuit law[5] that health

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[5]The Third Circuit in CardioNet, Inc. v. Cigna Health Corp., "adopt[ed] the majority position that health care providers may obtain standing to sue by assignment from a plan participant." 751 F.3d 165 (3d Cir. 2014). This is consistent with the law in the Eleventh Circuit that under § 502 of ERISA healthcare providers "are generally not 'participants' or 'beneficiaries' . . . and thus lack independent standing to sue under ERISA," but that "[h]ealthcare providers may acquire derivative standing . . . by obtaining a written assignment from a 'beneficiary' or 'participant' of his right to payment of benefits under an ERISA-governed plan." Physicians Multispecialty Grp.
v. Health Care Plan of Horton Homes, Inc., 371 F.3d 1291, 1294 (11th Cir. 2004) (further
holding as a matter of first impression that such "an assignment is ineffectual if the plan contains an unambiguous anti-assignment provision"). Unlike the Eleventh Circuit, the Third Circuit has not yet addressed whether an anti-assignment provision in an ERISA plan defeats the derivate standing of a medical provider suing to pursue benefits for services rendered on behalf of a patient. And numerous district courts in New Jersey, where *Cohen* was filed, have concluded that an unambiguous anti-assignment clause is fatal to derivate standing under ERISA. *See Cohen v. Independence Blue Cross*, 820 F.Supp.2d 594, 603-606 (2011) (discussing cases) ("Although the Third Circuit has not addressed the issue of anti-assignability clauses, a number of federal and state courts have found that unambiguous anti-assignment provisions in group health care plans are valid" to prohibit the subscriber from assigning his benefits).

care providers with valid assignments of benefit "have derivative ability to sue under ERISA" and that under the "well-pleaded complaint rule" the plaintiff's "allegation of an assignment in their Complaint is sufficient to establish their standing to bring this claim against Anthem and Verizon under ERISA § 502"). The court in *Cohen* denied the providers' motion to remand, adopting Verizon and Anthem's argument, and finding that "the parties do not dispute that Plaintiffs have standing to sue under section 502 as assignees" *Id.*, Order, Doc. 16 at 4.Dr. Griffin is therefore correct that Anthem and Verizon, in order to obtain federal jurisdiction over the case, originally represented to the court in *Cohen* that the plaintiffs there had derivate standing to sue under ERISA for underpayment of out-of-network medical services provided to a Verizon employee. However, Verizon and Anthem subsequently raised the anti-assignment defense as to the *Cohen* plaintiffs. As noted in their joint motion for summary judgment:
Following their denial of the remand motion, Defendants brought the fact that the Plan contains

an unambiguous anti-assignment provision to Professional Orthopaedic's counsel's attention. See Statement of Undisputed Facts ("SOF") at ¶ 16. The anti-assignment provision generally prohibits Plan beneficiaries from assigning their benefits to medical providers. Thus, the assignment executed by Patient N.M. never conferred to Professional Orthopaedic ERISA beneficiary status. Based on the anti-assignment language in the Plan, counsel for Professional Orthopaedic then filed an Amended Complaint naming only Patient N.M. as Plaintiff.*Id.*, Mot. for Summ. J., Doc. 31 at 6. Indeed, an amended complaint was filed on October 30, 2015, in which the medical providers dropped their claims against Verizon and Anthem, and the patient was substituted in their place as the sole plaintiff in the case. The docket reflects that the parties subsequently settled the case. *Id.*, Order, Doc. 38 ("dismissing case without prejudice as settled").

Next, Plaintiff alleges that Defendants did not raise anti-assignment arguments against the white, male providers in *Loft Chiropractic, P.C. v. Empire Healthchoice Assurance, Inc. et al.*, No. 1:12-cv-07272-PKC (S.D.N.Y. Apr. 24, 2017. (Second Am. Compl. ¶ 29.) In *Loft*, another white, male provider brought suit against Verizon and Empire Healthchoice Assurance, Inc. "("Empire"),[6] arguing that Verizon and Empire failed to pay for his chiropractic services as an out-of-network provider. *Loft Chiropractic*, No. 1:12-cv-07272-PKC, at Doc. 1. Like Plaintiff, the doctor in *Loft* obtained written assignments from patients as a condition of providing chiropractic services. *Id.* Verizon and Empire raised the issue of lack of standing as a defense in their respective answers, asserting that the "[p]laintiff's claims, including its claims for benefits pursuant to ERISA§ 502(a)(1)(B), are barred to the extent that it lacks standing to sue." *Id.*, Verizon Answer, Doc. 12; *id.*, Empire Answer, Doc. 13. The parties subsequently

[6] While Anthem is not a named defendant in *Loft*, Empire is a subsidiary of Anthem.

stipulated to dismissal of the case with prejudice before any dispositive motions were filed with the court. *Id.*, Stip. Dismiss, Doc. 18.

Plaintiff also cites *Patient Care Associates LLC v. Verizon Communications, Inc. et al.*, No. 2:12-cv-03750-CCC-JAD (D.N.J. May 29, 2013), as another example of Verizon's alleged discriminatory scheme. (Second Am. Compl. ¶¶ 30–31.) In *Patient Care*, the plaintiff alleged that Verizon[7] failed to pay the plaintiff benefits due under a Verizon employee group health plan. *Patient Care Assocs. LLC*, No. 2:12-cv-03750-CCC-JAD, Am. Compl., Doc. 16. The plaintiff treated a Verizon employee

[7] Anthem was not named as a defendant in *Patient Care*.

covered under Verizon's employee group health plan in its ambulatory surgery center and, as a condition of providing medical treatment, received a written "Assignment of Benefits" agreement from that Verizon employee. *Id.,* Am. Compl., Doc. 16 ¶ 6. Despite Dr. Griffin's allegation that Verizon did not challenge the *Patient Care* plaintiff's rights under ERISA because he was white and male, Verizon asserted as affirmative defenses in its answer that the "[p]laintiff lacks standing to assert the claims in [its] [c]omplaint" and that the "plaintiff's claims are barred by the express terms of the applicable health benefits plan." *Id.,* Verizon Answer, Doc. 18, ¶¶ 5, 8. The case docket reflects that shortly after Verizon filed its answer, the parties engaged in a settlement conference, and a voluntary stipulation of dismissal was subsequently entered closing the case.

In the fourth case cited by Plaintiff, *Community Chiropractic of County Club PLLC v. Empire Healthchoice Assurance, Inc. et al.*, No. 1:12-cv-05485- PKC, Doc. 1 (S.D.N.Y. July 8, 2013), the plaintiff provided chiropractic services to patients insured under Verizon's employee group health plan after obtaining written assignments from the patients. (Second Am. Compl. ¶¶ 32–34.) The

providers of *Community Chiropractic* sought to recover benefits due under the patients' Verizon plans. *Cmty. Chiropractic*, No. 1:12-cv-05485-PKC, at Doc. 1. Verizon and Empire both asserted as an affirmative defense in their respective answers that the all-male chiropractic group at Community Chiropractic lacked standing to sue under ERISA. *Id.*, Verizon Answer, Doc. 15; *id.*, Empire Answer, Doc. 16 ("Plaintiff's claims, including its claims for benefits pursuant to § 502(a)(1)(B), are barred to the extent it lacks standing to sue."). As in *Loft*, the case was voluntarily dismissed with prejudice by the parties before any motions were filed with the *Community Chiropractic* court. *Id.* at Docs. 23-24.

In the fifth case that Plaintiff points to, *Neurological Surgery, P.C. et al. v. Verizon Communications, Inc.*, No. 2:15-cv-04074-SJF-GRB, Doc. 5 (E.D.N.Y. Feb. 17, 2017), the plaintiffs brought suit against Verizon[8] for its failure to pay them for medical services provided to patients who were participants in Verizon's employee group health plan. (Second Amend. Compl. ¶¶ 35–37.) The plaintiffs obtained assignments of benefits from patients as a condition of service. *Neurological Surgery,* No. 2:15-cv-04074-SJF-GRB, at Doc. 5. In its answer to

[8] Anthem was not named as a defendant in *Neurological Surgery*.

the plaintiffs' complaint, Verizon asserted as an affirmative defense that the anti- assignment provision barred the plaintiffs' claims. *Id.,* Answer, Doc. 25 ¶ 25 ("**Twenty-Fifth Separate and Additional Defense (No Valid Assignment)**: To the extent Plaintiff's claims arise from assignment of health care benefits from Verizon's members, they fail to the extent [that the] relevant health care plans have anti-assignment provisions or [p]laintiffs lack valid assignments."). According to the docket, the parties subsequently reached a settlement and jointly stipulated to dismissal of the case.

Last, Plaintiff references *Shuriz Hishmeh, M.D., PLLC v. Verizon Communications, Inc. et al.*, No. 2:16-cv-06347 (E.D.N.Y. Feb. 24, 2017), as an example that the "privileged members of the [Good Old Boys] Club is growing." (Pl.'s Resp. at 2). While Plaintiff contends that Dr. Shuriz Hishmeh is "another male provider assignee" suing Verizon, she does not allege that Defendants did not seek to enforce its anti-assignment provision against Dr. Hishmeh. (*Id.*) The Court's review of the *Hishmeh* case reveals that Defendants referenced Dr. Hishmeh as the "*purported* assignee of its patients' rights and claims," in their notice of removal, but

no answers were filed before the parties stipulated to dismissal. *Hishmeh,* No. 2:16-cv-06347, at Doc. 1; *id.* at Doc. 10 (emphasis added). *Hishmeh* likewise does not support Plaintiff's allegation that Defendants selectively enforce the anti-assignment provisions in its employee group health plans.

As set out above, there is no indication in any of the six cases on which Plaintiff relies that Defendants permitted white, male providers to pursue the assigned ERISA medical benefits of their patients while denying Dr. Griffin the same rights based on her race and gender. As evidenced by the briefing in each of Dr. Griffin's cases pending before this Court, Defendants' anti-assignment defense is functionally equivalent to an argument based on "lack of standing." In light of the litigation history of these cases, the Court is therefore unable to draw a reasonable inference that Defendants are liable for the type of

discrimination alleged by Plaintiff.[9] Plaintiff has not alleged any other facts from which the Court could construe a plausible claim of discrimination. Absent such facts, the remaining allegations of Plaintiff's Second Amended Complaint are nothing more than conclusory recitations of the legal elements of a discrimination claim under Section 1557 of the ACA. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570; *see also Bernier*, 242 F. Supp. 3d at 43-44 ("Plaintiff's allegation that his exclusion from the patient assistance program was due to his race and age, *see* Compl. ¶ 47, is a bald assertion unsupported by any facts, and thus is insufficient to push his ACA claim "across the line from conceivable to plausible.")[10]

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[9] The Court acknowledges that in Dr. Griffin's case, Verizon pursued its anti-assignment defense to judgment resulting in the dismissal of her claim, whereas in some of the cases she relies on Verizon "settled" or stipulated to the dismissal of the provider's claims prior to asserting its standing defense in a dispositive motion. However, Dr. Griffin's discrimination claim is not based on Verizon's refusal to settle this lawsuit because of her race and/or gender. Nor would such an allegation be sufficient to assert a claim for discrimination "under any health program or activity" pursuant to § 1557 of the ACA.

[10] This is not to say that Plaintiff has no basis whatsoever for her personal concerns. The Court recognizes that medical providers' capacity to exercise bargaining power plays a major role in the insurance market – and has contributed to the growth and concentration of major medical

Thus, the Court must dismiss Plaintiff's claim for failure to state a claim under Rule 12(b)(6). The Court therefore need not consider Defendants' additional arguments that Verizon is not subject to the requirements of Section 1557, i.e. that it is not a "health program or activity, any part of which is receiving Federal financial assistance."

CONCLUSION

For the reasons stated above, Defendants' Motions to Dismiss [Docs. 38 & 39] are GRANTED. The Clerk is DIRECTED to close the case.

IT IS SO ORDERED this 26th day of September, 2017.

s/Amy Totenberg

United States District Judge

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provider entities. This systemic economic and health care dynamic may have other equity repercussions. But these dynamics are ones that the Court cannot account for in the context of this legal case.